[illegible]
NOV 21 1904
JAMES H. MCKENNEY
Clerk

# In the Supreme Court of the United States

No. 14, ORIGINAL. OCTOBER TERM, 1904.

*IN THE MATTER OF THE APPLICATION OF ALBERT [illegible] FOR A WRIT OF HABEAS CORPUS.*

BRIEF OF THE UNITED STATES FOR RESPONDENTS.

# In the Supreme Court of the United States.

No. 14, ORIGINAL. OCTOBER TERM, 1904.

*IN THE MATTER OF THE APPLICATION OF ALBERT HEFF FOR A WRIT OF HABEAS CORPUS.*

## BRIEF OF THE UNITED STATES FOR RESPONDENTS.

### STATEMENT.

Petitioner was convicted in the District Court of the United States for the District of Kansas of violating the act of Congress of January 30, 1897, c. 109 (29 Stat., 506), entitled "An act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes." That act provides:

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, *to any Indian to whom allotment of land has been made, while the title to the same shall be held in trust by*

*the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship*, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however*, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department, or any officer duly authorized thereunto by the War Department.

SEC. 2. That so much of the act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this act, is hereby repealed.

The indictment charged that Albert Heff, on or about March 20, 1904, in the first division of the Dis-

trict of Kansas and within the jurisdiction of the District Court—

> did then and there unlawfully sell, give away, and dispose of certain malt, spirituous, and vinous liquors at the town of Horton, in the county of Brown, in the State and District of Kansas, to John Butler, to wit, 2 quarts of beer, more or less, and he, the said John Butler, being then and there an Indian, a member of the Kickapoo tribe of Indians, and a ward of the Government, under the charge of O. C. Edwards, an Indian superintendent, contrary to the form of the statute, etc.

Petitioner was sentenced to be imprisoned in the county jail of Shawnee County, Kansas, for four months, and to pay a fine of $200 and costs, and it was ordered that he stand committed until the fine and costs were paid.

The act of February 8, 1887, c. 119 (24 Stat., 388), is entitled "An act to provide for the allotment of lands in severalty on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Section 1 of that act provides:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or

> any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located therein in quantities as follows: * * *

Section 3 provides "that the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe."

Section 4 provides that Indians not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, may make selections of public lands not otherwise appropriated in quantities and manner as provided in that act for Indians residing upon reservations.

Section 5 provides:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such

land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. * * *

Section 6 is as follows:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to

all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

**ARGUMENT.**

The sole question on this application is the constitutionality of the act of January 30, 1897, so far as it relates to Indians who have received allotments of land in severalty under the provisions of the act of February 8, 1887.

There is no dispute as to the facts. As the petition alleges, the Indian to whom the liquor was sold was a member of the Kickapoo tribe. He had received an allotment within the Kickapoo Reservation, in the State of Kansas, and was residing thereon; and there is "an agent and superintendent who was appointed by the Government and who assumes and transacts the business of the Government with and for such allotted Indians." (Pet., p. 2.)

The town of Horton, where the liquor was sold, is 6 or 7 miles from the reservation.

Petitioner contends that the act of January 30, 1897, is unconstitutional as applied to sales of liquor to an Indian who has received an allotment of land under the provisions of the act of February 8, 1887, "because it is provided in said act that each and every Indian to whom such allotments have been made shall be sub-

ject to the laws, both civil and criminal, of the State or Territory in which they may reside."

He also contends "that John Butler, having received an allotment of land in severalty and his patent therefor under the provisions of the act of Congress of February 8, 1887, is no longer a ward of the Government, but a citizen of the United States and of the State of Kansas, and subject to the law, both civil and criminal, of said State."

## POWER OF CONGRESS TO REGULATE LIQUOR TRAFFIC WITH THE INDIANS.

The leading case on this subject is *United States* v. *Holliday* (3 Wall., 407), where the act of Congress of February 13, 1862 (12 Stat., 339), which made it a penal offense for any person to sell spirituous liquors "to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States," was held to be constitutional.

In that case the court laid down the following principles:

1. The power to regulate the sale of liquor to Indians is based upon the power of Congress to regulate commerce with the Indian tribes.

2. Commerce with the Indian tribes means commerce with the individuals composing those tribes.

3. Congress may regulate such commerce although it is carried on wholly within the limits of a State, the locality of the traffic having nothing to do with its power to regulate it.

4. In determining whether any particular body of Indians are still to be regarded as a tribe, or have

ceased to hold the tribal relation, the court will follow the action of the executive and other political departments of the Government.

5. Neither the constitution of the State nor any act of its legislature can withdraw the Indians from the influence of an act of Congress which that body has the constitutional right to pass.

These principles have been applied in numerous cases, Federal and State, which are collected in Rose's Notes, vol. 6, p. 528.

In *United States* v. *43 Gallons of Whiskey* (93 U. S., 188), referring to the power of Congress to regulate commerce with the Indian tribes, the court said (p. 195):

> The power is in no wise affected by the magnitude of the traffic or the extent of the intercourse. *As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government,* Congress has the power to say with whom and on what terms they shall deal, and what articles shall be contraband.

**TRIBAL ORGANIZATION OF KICKAPOOS NOT AFFECTED BY THE ACT OF FEBRUARY 8, 1887.**

Assuming that the power of Congress to regulate commerce with the Indian tribes—including the sale of liquor to them—is dependent upon the existence of the tribal organization, it is apparent, from the legislation of Congress and the action of the Executive Department of the Government, that the tribal relations of Indians receiving allotments and becoming citizens

of the United States under the act of February 8, 1887, were not intended to be affected thereby.

Section 5 of the act of February 8, 1887, contains this provision:

> That at any time after lands have been allotted to *all* the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate with such Indian tribe* for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribes shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable, etc.

That section further provides:

> And the sums agreed to be paid by the United States as purchase money for any portion of such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservations belonged, and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of *such tribe or tribes of Indians or the members thereof.*

It appears from the reports of the United States Indian agents in charge of the Kansas reservations that lands were allotted in severalty, under the provisions of the act of February 8, 1887, to *all* the Indians of the Kickapoo Reservation before the end of Feb-

ruary, 1895, except to children born since that date. (Ann. Rep. Dep. of Int. 1897, p. 151; id., 1902, pt. 1, p. 217.)

The Indian appropriation act of March 2, 1895 (23 Stat., 876), provided:

> SEC. 10. That with the consent of a majority of the chiefs, headsmen, and male adults of the Pottowotomie tribe of Indians and the Kickapoo tribe of Indians in the State of Kansas, *expressed in open council by each tribe*, the Secretary of the Interior be, and he hereby is, authorized to cause to be sold, in trust for said Indians, the surplus or unallotted lands of the reservations of the Pottowatomie tribe of Indians of Jackson County, Kansas, and the Kickapoo tribe of Indians in Brown County, Kansas.
>
> * * * * *
>
> That before any of the surplus lands belonging to the Kickapoo tribe of Indians shall be sold under the provisions of this section there shall be allotted by the Secretary of the Interior eighty acres to each of the children of said tribe residing in or adjacent to said reservation who may not have heretofore received any lands: *Provided*, That this section may be adopted or rejected separate and apart from other provisions of this act, by the said Kickapoo tribe.

The act of February 28, 1899, c. 222 (30 Stat., 909), entitled "An act providing for the sale of the surplus lands on the Pottowatomie and Kickapoo Indian reservations in Kansas, and for other purposes," contained similar provisions for the sale of the surplus or unal-

lotted lands of those reservations, with the consent of the majority of the chiefs, headmen, and male adults of those two tribes. Section 5 of that act provided:

> That before any of the surplus lands belonging to either of said tribes of Indians shall be sold under the provisions of this act there shall be allotted by the Secretary of the Interior eighty acres to each absentee of said tribe, and also to each of the children of the members of the respective tribes born since the allotments heretofore made were closed, and to whom allotments have never been made, but all allotments shall be made and accepted subject to existing leases: *Provided*, That in making these allotments the said Pottowatomie children and absentees shall be restricted to the Pottowatomie lands, and the Kickapoo children and absentees to the Kickapoo lands: *Provided, further*, That this paragraph relating to allotments may be adopted or rejected by either tribe separate and apart from and without affecting the other provisions of this act.

In the report of the United States Indian agent for the Kansas reservations of August 14, 1902 (Ann. Reps. Dep. of Int., 1902, pt. 1, p. 217), that official says:

> The Kickapoo Indians readily accepted the proposition, when submitted to them, to allot the surplus land of their reservations to their children born since allotments were closed in February, 1895, and to absentee members of the tribe; and have forwarded a petition signed by a majority of the adult male members of the tribe, and are anxiously awaiting further action thereon.

By the act of March 3, 1903, c. 994 (32 Stat., 982, 1007, sec. 7) section 5 of the act of February 28, 1899, above set forth, was amended by inserting this provision:

> *Provided further*, That in case there are not sufficient surplus lands belonging to either tribe to allot to each child and absentee in quantity as above provided, said surplus lands shall be allotted to each of said children and absentees pro rata, as near as may be, according to legal subdivisions.

The report of the superintendent of the Kickapoo Reservation, dated August 11, 1903 (Ann. Reps. Dept. of Int., 1903, pt. 1, p. 182), contains this statement:

> *Kickapoo Allotment Council.*—By direction of the Indian Office in communication dated April 22, 1903, in pursuance of the act of February 28, 1899, and an act of March 3, 1903, amending section 5 of the act of February 28, 1899, a council of the Kickapoo Indians was called on May 16, 1903, to which all chiefs, headmen, and male adults were invited. In open council, after full explanation by reliable interpreters and free discussion, a majority of the headmen and adults accepted the provisions of the amended enactment, thus agreeing to a pro rata allotment, as provided for in section 5 of the amended act.

It thus appears that in the act of 1887 itself, as well as in subsequent legislation and in executive action pursuant to that act, the continuance of the tribal relation of the Indians referred to was distinctly recognized.

### TREATIES WITH KICKAPOOS.

By a treaty with the Kickapoos made at Castor Hill, Missouri, October 24, 1832 (Revision of Indian Treaties, 1873, p. 441), that tribe, in consideration of certain annuities and sums to be paid by the United States, ceded to the United States the lands which had been previously assigned to them in the State of Missouri. The United States, on its part, agreed to "provide for the Kickapoo tribe a country to reside in, southwest of the Missouri River, as their permanent place of residence *as long as they remain a tribe*," and by the treaty assigned, conveyed, and secured to the Kickapoos such a tract, to which the Kickapoos agreed to remove. (Arts. 1, 2, 13.)

By a treaty made May 18, 1854 (Revision of Indian Treaties, 444), the Kickapoo tribe of Indians ceded, sold, and conveyed unto the United States for the sum of $300,000 "all that country southwest of the Missouri River which was provided as a permanent home for them in the treaty of Castor Hill," of October 24, 1832, "saving and reserving in the western part thereof 150,000 acres for a future and permanent home, which shall be set off for and assigned to them by metes and bounds." (Arts. 1, 2.) That treaty further provided:

> ART. 3. The President may cause to be surveyed, in the same manner in which the public lands are surveyed, the reservation herein provided for the Kickapoos; and may assign to each person or family desiring it such quantity of land as, in his opinion, will be sufficient for such person or family, with the understanding

that he, or they, will occupy, improve, and cultivate the same, and comply with such other conditions as the President may prescribe. The land thus assigned may hereafter be confirmed by patent to the parties or their representatives, under such regulations and restrictions as Congress may impose.

The latest treaty with the Kickapoos, concluded June 28, 1862 (Revision of Indian Treaties, 447), as amended, contained these provisions:

ARTICLE 1. The Kickapoo tribe of Indians, believing that it will contribute to the civilization of their people to dispose of a portion of their present reservation in Kansas, consisting of one hundred and fifty thousand acres of land, to allot land in severalty to those members of said tribe who desire to have separate tracts of lands, and have adopted the customs of the whites, and to set apart for the others of said tribe a portion of said reservation, to be held by them in common, or (if a majority of them so elect) provide for them a suitable home elsewhere, to be held by them in common, it is therefore hereby agreed that the Secretary of the Interior shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed, and the quantity of land hereinafter mentioned to be set apart to those of said tribe who desire to have their land in severalty; and, if so elected by a majority of the others of said tribe, the quantity of land hereinafter mentioned to be by such others held in common, and the remainder of the land, after the special reservations herein-

after provided for shall have been made, to be sold for the benefit of said tribe.

ART. 2. It shall be the duty of the Secretary of the Interior to cause to be made an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and heads of families respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind and otherwise incompetent, as to which of these classes they will belong. And thereupon shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief, at the signing of the treaty, one half section; to each other head of a family one quarter section, and to each other person forty acres of land; to include in every case, as far as practicable, to each family their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of only to the United

States, or to persons then being members of the Kickapoo tribe, and of Indian blood, with the permission of the President, and under such rules and regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificate, the person(s) to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ART. 3. At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be set apart and placed to their credit severally, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be

subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That, before making any such application to the President, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

* * * * *

ART. 14. It is further agreed that all rights, title, and interest of the Kickapoos in their present reservation shall cease, and the same is hereby ceded to and vested in the United States, subject to the limitations and for the purposes herein expressed and provided for.

ART 15. Any stipulation in former treaties inconsistent with those embraced in the foregoing articles shall be of no force or effect.

It will be observed that this treaty provided for the division of the Kickapoos into two classes—those desiring lands in severalty and those preferring to continue holding their lands in common; the assignment of lands in severalty to the first class, the tracts so assigned to be "set apart" for the perpetual and exclusive use and benefit of such assignees and their heirs, such tracts to be exempt from levy, taxation, and sale, and assignable in fee only to the United States or

members of the Kickapoo tribe, under the supervision of the Secretary of the Interior; and finally, whenever the President should become satisfied that any of such allottees who were adults and heads of families had become sufficiently intelligent and prudent to control their affairs and interests, the conveyance of the lands assigned to them by patent in fee simple, with the power of alienation, at the same time setting apart and placing to their credit, severally, their proportion of the trust funds of the tribe held by the United States, etc.; it being further provided that "on such patent being issued, and such payments ordered to be made by the President, *such competent persons shall cease to be members of said tribe, and shall become citizens of the United States*, and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

Comparing the provisions of this treaty with those of the act of February 8, 1887, these differences will be perceived: The treaty contemplates the assignment of lands in severalty only to *some* of the members of the Kickapoo tribe, while the act contemplates such assignment to *all* the members of the tribes referred to (sec. 5). The treaty provides for the complete separation from the tribe of those Indians who should be adjudged by the President competent to control their own affairs and interests, and to whom patents in fee for their allotments should be issued; while the act provides for no such separation, but contemplates the continuance of the tribal organization after all the members have received allotments.

**WHEN INDIANS WHO HAVE RECEIVED ALLOTMENTS BECOME CITIZENS OF THE UNITED STATES AND SUBJECT TO THE LAWS OF THE STATE.**

It will also be observed that under the treaty of 1862 citizenship was to be reserved until the issuance of the patent in fee, after which, it was provided, the lands so patented "shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

It is not quite clear when Congress intended citizenship to attach in the case of allotments under the act of 1887, or when allottees should be entitled to the benefit of and become subject to the laws of the State or Territory in which they may reside. In the cases referred to by petitioner it has been decided, while in others, hereafter referred to, it has been assumed, that those consequences attached upon the receipt of the first patent (so called) for the lands allotted.

In *United States* v. *Rickert* (188 U. S., 432) this court appears also to have assumed that such was the fact. In that case it was held that a State had no authority to tax lands allotted to the Indians under the act of 1887, or the improvements or personal property of the Indians received from the United States and used thereon, while the lands were held in trust by the Government. It was also held that Indians who had received allotments under the act of 1887 were still wards of the Government. No specific reference was made in the opinion, however, to the provisions of section 6, subjecting Indians who have received allotments to the laws of the State or Territory in which they may reside, and declaring them to be

citizens of the United States. But it would be absurd to suppose that the court did not have those provisions in mind in deciding the case. The reference in the opinion to the title of the act of 1887—"An act to provide for the allotment of lands in severalty on the various reservations, *and to extend the protection of the laws of the United States and the Territories over the Indians*," etc.—would indicate otherwise. Besides, unless those provisions applied, the situation would have been the same as that presented in the *Kansas Indians* (5 Wall., 737), and there would have been no pretense of authority on the part of the State to levy the taxes in question. The decision of the Circuit Court was distinctly based upon the ground that under the legislation of Congress the Indians referred to were "citizens of the United States and of the State of South Dakota," and "entitled to the benefits of and subject to the laws, both civil and criminal, of the State of South Dakota." (*United States* v. *Rickert*, 106 Fed., 1, 5.)

**ASSUMING THAT INDIANS WHO HAVE RECEIVED THEIR FIRST PATENT FOR LANDS ALLOTTED TO THEM UNDER THE ACT OF 1887 ARE SUBJECT TO THE CIVIL AND CRIMINAL LAWS OF THE STATE, THAT FACT IS NOT INCONSISTENT WITH THE POWER OF CONGRESS TO REGULATE COMMERCE WITH THEM.**

The distinction between regulations of commerce and ordinary criminal legislation is recognized in *United States* v. *Kagama* (118 U. S., 375). It was contended in that case that the act of Congress of March 3, 1885, making certain offenses committed by one Indian against the person or property of another Indian

within a Territory subject to its criminal laws, was an exercise of the power of Congress to regulate commerce with the Indian tribes. But the court, referring to the constitutional provision containing the grant, said (p. 378):

> This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws, justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

The act was sustained, however, upon broader grounds: (1) As an exercise of the sovereignty of the United States over the Territories and its ownership of the country which they comprised; and (2) as authorized by the exclusive jurisdiction and control of Congress over the Indians, within the limits of the United States, whether in the States or in the Territories.

In the very case upon which petitioner relies—*State* v. *Campbell* (53 Minn., 354)—the Supreme Court of Minnesota recognized the fact that its criminal jurisdiction was limited by the power of Congress to regu-

late commerce with the Indian tribes. As stated in the headnote, the court there held:

> Unless otherwise provided by treaty with an Indian tribe, or by the act admitting the State into the Union, the criminal laws of the State, *except so far as restricted by the authority of Congress "to regulate commerce with the Indian tribes,"* extend to all crimes committed on an Indian reservation by persons other than tribal Indians.

It was further held in that case that—

> Indians, while preserving their tribal relations and residing on a reservation set apart for them by the United States, are the wards of the General Government, and as such the subjects of Federal authority, and the power to legislate for them is exclusively in Congress. And for acts committed within the limits of the reservation they are not subject to the criminal laws of the State.

The case of *United States* v. *Ward*, McCahon's Reps., 199 (Circuit Court, D. Kansas, 1863), also relied upon by petitioner to show that there can be no divided jurisdiction over the Indians, merely held that the State of Kansas had exclusive jurisdiction to try a white man for the murder of another white man committed upon an Indian reservation in that State. This is no more than was held in *United States* v. *McBratney* (104 U. S., 621) and *Draper* v. *United States* (164 U. S., 240).

In *Utah and Northern Railway* v. *Fisher* (116 U. S., 28), the court held that the Fort Hill Indian Reservation, not having been excluded from the limits of the Territory of Utah by the act creating it, or by the

treaty with the Indians located thereon, the Territory had general jurisdiction over such reservation in matters not interfering with the protection of the Indians by the Federal Government in accordance with treaty stipulations.

The observation in *The Kansas Indians* (5 Wall., 737, 755), that if the Indians are under the control of Congress, "from necessity there can be no divided jurisdiction," is manifestly inapplicable where Congress itself chooses to divide its jurisdiction with the State. In that case the court was referring to the right of the State of Kansas to tax lands in that State held in severalty by individual Indians, and it was held that it could not, not only because of treaty stipulations, but because while the Indians maintained their tribal organization they were under the exclusive jurisdiction of the General Government.

If under the exclusive jurisdiction of the General Government, then Congress has the right to say by what laws they shall be governed; and it is immaterial, so far as the question of power is concerned, whether Congress decrees that they shall be governed solely by legislation enacted by itself in the first instance or partly by the laws of the State or Territory in which they reside.

It had early been settled that the States were without authority to extend their laws, civil and criminal, over the Indian tribes residing within their limits.

*Worcester* v. *Georgia*, 6 Pet., 515.
*Fellows* v. *Blacksmith*, 19 How., 366.
*United States* v. *Kagama*, 118 U. S., 384.

When, therefore, Congress, by the act of February 8, 1887, in the exercise of its plenary and exclusive authority over its Indian wards, made them, as has been assumed, citizens of the United States, and subject to the laws, civil and criminal, of the State or Territory in which they may reside, upon what theory can it be said that it could not reserve, as the act of January 30, 1897, shows it intended to do, the power to regulate commerce with them as members of their respective tribes? Any jurisdiction that the States may have over the Indians being derived from Congress, is subject to alteration and repeal by Congress. It follows, therefore, that if the jurisdiction conferred upon the States by the act of February 8, 1887, over Indian allottees is inconsistent with the act of January 30, 1897, the former act must be held to be in so far repealed.

**CITIZENSHIP OF INDIAN ALLOTTEES NOT INCONSISTENT WITH GUARDIANSHIP OF CONGRESS.**

The act of February 8, 1887, itself contemplates the further control of Congress. Assuming that it confers citizenship, it at the same time imposes restraints and limitations upon the Indians inconsistent with any other theory than that of their continuing wardship. The title to the lands allotted to them is to be held in trust for them by the Government for twenty-five years, with discretionary power in the President to extend the period in any case. So, too, the act forbids any conveyance of such lands or any contract touching them before the expiration of such period; while later acts only allow the allottee to lease his lands for par-

ticular purposes and for short periods, under the supervision of the Secretary of the Interior (act February 28, 1891, c. 383, 26 Stat., 794; act August 15, 1894, c. 294, 28 Stat., 285; act March 2, 1895, c. 188, 28 Stat., 876; act May 31, 1900, c. 598, 31 Stat., 221). The guardianship of the United States in this respect is recognized in—

> *Cherokee Nation* v. *Hitchcock*, 187 U. S., 307–8.
>
> *Lone Wolf* v. *Hitchcock*, 187 U. S., 567.

The act of February 8, 1887, also provides that money paid by the United States for the purchase of the surplus lands of any of the tribes authorized to be sold after all the members thereof have received allotments is to "be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservations belonged; and the same, with the interest thereon at three per cent per annum, *shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.*" (Sec. 5.)

The continuing guardianship of the General Government is recognized in the Indian appropriation act of March 3, 1891, c. 543 (26 Stat., 987, sec. 1), which provides:

> That in the expenditure of money appropriated for any of the purposes of education of Indian children, those children of Indians who have taken land in severalty under any existing law, shall not, by reason thereof, be excluded from the benefits of such appropriation.

Prior appropriation acts contained a like provision.

Appropriations are annually made for the support and education of the Kansas Kickapoos. (31 Stat., 243, 1080; 32 Stat., 271, 1004; 33 Stat., 213.)

It is difficult to understand why the United States may not exercise the same care and control over its Indian citizens, if incompetent to take care of themselves, that a State exercises over its dependent, ignorant, or afflicted citizens. It does not follow because a person is a citizen that he is in every respect *sui juris.* Infants, insane persons, and married women, although citizens, have always been the subject of special legislation on the part of the States, and it is a common thing for the States to restrict the sale of liquor and other noxious articles to minors.

In *Crowley* v. *Christensen* (137 U. S., 86), the court said (p. 91):

> There is no inherent right in a citizen to thus sell intoxicating liquors by retail; *it is not a privilege of a citizen of a State or of a citizen of the United States.* As it is a business attended with danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils.

That an Indian may be endowed with citizenship and still need the protecting care of government is recognized by the court in *United States* v. *Ritchie* (17 How., 525). In that case it appeared that the organic law of the Mexican Republic had declared the Indians of Mexico citizens, presumably in recognition of their

services in throwing off the Spanish yoke. It had invested them with the privileges of citizenship, said Mr. Justice Nelson in delivering the opinion of the court, as effectually as the Declaration of Independence had invested all persons with those privileges who resided in this country at the time and adhered to the interests of the Colonies. But he added (pp. 539–540):

> The improvement of the Indians under the influence of the missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had, doubtless, qualified them *in a measure* for the enjoyment of the benefits of the new institution. In some parts of the country very considerable advancement had been made in civilizing and Christianizing the race. *From their degraded condition, however, and ignorance generally, the privileges extended to them in the administration of the Government must have been limited; and they still, doubtless, required its fostering care and protection.*

The case of *United States* v. *Rickert* (188 U. S., 432) seems decisive of this question of guardianship. Referring to the character of the relations between the United States and the Indians after the passage of the act of February 8, 1887, the court said (p. 437):

> These Indians are *yet* wards of the nation, in a condition of pupilage or dependency, *and have not been discharged from that condition.* They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of

> 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship.

Again (p. 442):

> It is not a relation simply of contract, each party to which is capable of guarding his own interests, but the Indians are in a state of dependency and pupilage, entitled to the care and protection of the Government. When they shall be let out of that state is for the United States to determine without interference by the courts or by any State.

In reply to the question whether the United States had such an interest in that controversy or its subjects as entitled it to maintain that suit, the court said (p. 444):

> In view of the relation of the United States to the real and personal property in question, *as well as to these dependent Indians still under national control*, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary.

In conclusion the court said (p. 445):

> Some observations may be made that are applicable to the whole case. It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily be-

> long to citizens, and that they ought therefore to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. *It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship.* That is a political question which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress.

As already observed, the court in this case must have assumed that the provisions of section 6 of the act of 1887 made Indians who had received their first patent for allotments thereunder subjects to the laws of the of the State and citizens of the United States.

The District Court denied petitioner's contention as to the unconstitutionality of the act of January 20, 1897, upon the authority of *Farrell* v. *United States* (110 Fed., 942), decided by the Circuit Court of Appeals for the Eighth Circuit. That case was similar to this in its facts. Farrell had been convicted of selling liquor in South Dakota to a mixed-blood Indian of the Sioux tribe, in charge of the agent of the Sisseton Agency. It further appeared that under the constitution and laws of South Dakota the Indian, by reason of his United States citizenship (which the court assumed had been conferred upon him by the act of February 8, 1887), was also a citizen of that State. In a well-considered opinion by Judge Sanborn, in which the legislation of Congress and the relations of the Federal Government with the Sisseton and Wahpeton

tribes were reviewed, the court reached the conclusion that the Congress had never renounced its power to regulate commerce with those Indians, and that the act of January 30, 1897, was neither unconstitutional nor inapplicable to the case presented. At the close of the opinion occurs this résumé (p. 952):

> But the considerations to which reference has now been made are persuasive that the courts ought not to hold that Congress has renounced its power to prohibit the traffic in intoxicating liquors with Indians who have taken their allotments and patents under the act of 1887, but for whom the Government still hold their lands in trust, until the legislative department of the Government gives more positive indications of its intention so to do. The original condition of these Indians as wards of the Government; the original power of Congress to regulate commerce with them; the settled policy and practice of the nation to prohibit traffic with them in intoxicating liquors; the stipulation of the treaty of 1867 that the Government would appoint an agent, whose duty it has always been to suppress this traffic; the absence of any condition in the act of 1887 requiring allottees to surrender their tribal relation or tribal property; the continuing need of the suppression of the liquor traffic with them while the Government holds their lands in trust for the individual Indians as well as while it held them in trust for the same Indians collectively; the absence of any express renunciation of its power by Congress, and of any treaty or act of Congress repugnant to its retention and

exercise; the holding of both the legislative and executive departments that it still exists, notwithstanding the allotments and patents under the act of 1887; the uniform exercise of this authority and the continuing endeavor of these departments to suppress this baleful traffic in spirituous liquors with these Indians since their patents were issued as before, compel the conclusion that Congress has never renounced its power to regulate this commerce, and that the act of 1897 is neither unconstitutional nor inapplicable to the case at bar.

Prior to the decision of this court in *United States* v. *Rickert*, above cited, it had been repeatedly and uniformly held by the Federal courts that the act of February 8, 1887, in conferring United States citizenship, as it was assumed, did not change the status of Indian allottees as wards of the Government or abolish the reservations.

*Eells* v. *Ross*, 64 Fed., 417, 419, Circuit Court of Appeals, North Circuit.

*United States* v. *Logan*, 105 Fed., 240, 241, Circuit Court, District of Oregon.

*United States* v. *Flournoy Live Stock, &c., Co.*, 69 Fed., 886, Circuit Court, District of Nebraska.

*United States* v. *Mullin*, 71 Fed., 682, 685, District Court, District of Nebraska.

In *United States* v. *Belt*, 128 Fed., 168, the District Court, M. D. Pennsylvania, held that the act of January 30, 1897, included within its protection Indian students at the Carlisle School.

See also—

*United States* v. *Kiya*, 126 Fed., 879, 881, District Court, D. North Dakota.

*In re Lincoln*, 129 Fed., 247, District Court, N. D. California.

In *Mulligan* v. *United States* (120 Fed., 98) the Circuit Court of Appeals for the Eighth Circuit also held that an indictment was good which charged the defendant with selling liquor to "an Indian and a member of the prairie band of Pottawatomie Indians, and a ward of the Government, under the charge of W. R. Honnell, an Indian agent," when the proof showed that he was also an Indian to whom an allotment of land had been made, the title to which was held in trust by the Government under the act of February 8, 1887. The court held that in such case the Indian fell within both of the prohibited classes in the act of January 30, 1897. This is the situation in the present case. The Kickapoo Indian here referred to might also come within the third class designated in the act of January 30, 1897, namely, "any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship." These several provisions indicate that the manifest purpose of that act was to protect all classes and conditions of Indians under the control of the Government.

**POWER OF THE FEDERAL GOVERNMENT TO PROTECT THE INDIANS NOT DEPENDENT UPON THE PRESERVATION OF TRIBAL RELATIONS.**

This question is not necessarily involved in this case, since, as above set forth, the tribal organization

of the Kickapoos has been preserved. But an inquiry into the authority of Congress over the Indians would be incomplete without some reference to it.

There have been expressions by this court in some cases which might be taken to indicate that upon the dissolution of the tribal organization Congress would lose its control over the Indians. But what the court was considering in those cases was not when the control of the General Government would cease, but when any jurisdiction on the part of the State would accrue. Thus, in the *Kansas Indians* (5 Wall., 737), the question was simply whether the holding by Indians of lands in severalty within the limits of that State gave the State the right to tax them, and the court said that as long as the tribal organization was maintained they were under the *exclusive* jurisdiction of the United States.

So, in *United States* v. *Kagama* (118 U. S., 375), the court said (p. 379):

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

There is nothing in such expressions to warrant the conclusion that a dissolution of the tribal relation would

divest the General Government of its control over the Indians. While it might have the effect of destroying their position as a semi-independent people, and also subject them in some respects to the jurisdiction of the State in which they might reside, it can not be held to deprive or relieve the General Government, without its consent, of its powers, duties, and obligations in regard to them.

From the adoption of the Constitution the Indians have been under the exclusive control of the General Government. This has been repeatedly recognized by this court.

> *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S., 641, 653.
>
> *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 484.

In *United States* v. *Kagama*, the court said (118 U. S., 384):

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied, and because it alone can enforce its laws on all the tribes.

The Indians being originally under the exclusive control of the General Government, it would seem to

follow that in its treatment of them it may confer upon them such rights and privileges and upon the States such jurisdiction over them as it deems best for their interests.

The power of the General Government to protect the Indians is coextensive with its power to protect any other person or thing under its jurisdiction or control. Thus it may, by special legislation, protect the United States mail and the United States mail carriers. The fact that those subjects are within the limits and to some extent subject to the jurisdiction of the States does not take them out of the protection of the General Government. Its jurisdiction in such cases is dependent upon the nature of the subject-matter, not upon its locality.

In *United States* v. *Kagama* the court, referring to the clause of the act of Congress of March 3, 1885, which relates to crimes committed by one Indian against the person or property of another Indian upon Indian reservation within the boundaries of a State, said (118 U. S., 383):

> The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitations in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State and made it punishable within the courts of the United States. But Congress *has* done this, and *can* do it with regard to all offenses relating to matters to which the Federal authority extends.

In *State* v. *Campbell* (53 Minn., 354), cited by petitioner, the Supreme Court of Minnesota said that in *United States* v. *Kagama* this court had very distinctly developed and announced the doctrine that—

> the jurisdiction of the Federal Government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact that, as the wards of the General Government, they are subjects of the Federal authority within the States as well as within the Territories.

In *Renfrow* v. *United States* (3 Okla., 166) the Supreme Court of Oklahoma held that it was unlawful, under section 2139, Revised Statutes, to sell liquor to an Indian who had received an allotment of lands *and whose tribe had been dissolved*, while he was still under the control of an Indian agent. In that case, the court said (pp. 172–3):

> There seems to be a contention upon the part of counsel below that, because these Indians have become, under the laws of the United States, naturalized citizens, that therefore people are at liberty to deal with them to the same extent as they would with white citizens. We think counsel are in error in this regard. These Indians may be citizens of the United States, and yet not possessed of all the privileges given to other citizens. There is such a thing as a qualified citizenship.
>
> * * * * *
>
> As to the question of the length of time these Indians have been citizens, and also as to

> whether they became citizens under the act of 1887, *supra*, or in Kansas, in 1866, is, we think, immaterial. The statement of facts shows that they bear the same relation to the General Government, to the Indian department, and to the Indian agent at Sac and Fox Agency as do the other Pottawatomie Indians. Neither do we think it matters whether they are full-blood Indians, or less than full-blood Indians. The relation they bear to the General Government, by treaty stipulations, is that of Indians still to some extent under the control of the Indian department.

From the power granted to Congress to regulate commerce with the Indian tribes has been developed the theory as to the guardianship of the United States over them, not only collectively, but individually. The ultimate object of the paternal care exercised by the General Government has been, as is well known, to fit the Indians for the duties and responsibilities of citizenship. In the attainment of that object it will eventually become necessary to dissolve their tribal relations. At that particular period in their development the care and protection of the General Government will be most essential to their welfare. It can not be that they will be deprived of its sustaining arm in the hour of their greatest need.

The case of *United States* v. *Rickert*, above cited, seems conclusive of the proposition that the termination of the Indian's condition of dependency, pupilage, or wardship rests entirely upon the will of Congress,

and is not affected by the considerations of citizenship or tribal relation.

For the reasons above set forth, the petition for a writ of habeas corpus should be denied.

HENRY M. HOYT,
*Solicitor-General.*

O